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No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMBASSADOR HOTEL COMPANY OF LOS ANGELES,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 39-64) are reported at 32 T.C. 208. The opinion of the Court of Appeals (R. 80-85; Pet. 16-24) is reported at 280 F. 2d 303.

JURISDICTION

The judgment of the Court of Appeals (R. 86; Pet. 25) was entered on June 10, 1960. A petition for rehearing was denied (R. 87; Pet. 26) on August 1, 1960.[1] The petition for a writ of certiorari was

[1] By the same order (R. 87; Pet. 26), the Court of Appeals also rejected a suggestion for a rehearing *en banc*.

filed on October 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the income tax deficiency for fiscal year 1944 determined by the Commissioner against the taxpayer was assessable by virtue of the one year special limitation period prescribed by Section 3807 of the 1939 Internal Revenue Code with respect to the related World War II excess profits tax overpayment for the same year determined by the Tax Court in a prior case.

STATUTE INVOLVED

Section 3807 and other pertinent provisions of the 1939 Internal Revenue Code are set forth in the Appendix, *infra*, pp. 13–26.

STATEMENT

In a prior proceeding[2] in the Tax Court with respect to the taxpayer's excess profits tax liability for its fiscal year ended January 31, 1944, it was finally decided on April 12, 1955, that there was an overpayment of $26,475.54,[3] "which amount was paid within three years before the filing of the claim, which claim was filed within three years from the time the return was filed * * *." (R. 43.)

Subsequently, on December 29, 1955 (R. 7), the Commissioner—by the usual 90-day letter, or statu-

[2] *Ambassador Hotel Co. of Los Angeles* v. *Commissioner*, 23 T. C. 163.

[3] That overpayment was found in lieu of a $92,000 deficiency in excess profits tax which had been determined by the Commissioner for that year. (R. 9.)

tory notice of deficiency, and an accompanying Statement (R. 7–12)—gave notice to the taxpayer of the determination of a deficiency of $33,290.61 in income tax for the same year (fiscal year 1944), explaining the deficiency (with detailed computations) as one resulting from the adjustment to the related excess profits tax made in the prior case (R. 9), and stating that the deficiency was "assessable under the provisions of section 3807 of the Internal Revenue Code of 1939" (R. 10; see also R. 40–41, 44–45).

The taxpayer challenged this income tax deficiency in the Tax Court in the present proceeding (R. 5–12)—only upon the ground that it "was barred by the statute of limitations" (R. 6; see also R. 41, 45, 48).

The Tax Court resolved the issue against the taxpayer (R. 38–64, 71), holding that the proposed income tax deficiency was timely under Section 3807 of the 1939 Code,[4] since it was asserted within one year after the Tax Court determined (in the prior case) the excess profits tax overpayment for the same fiscal year (R. 45–64).[5]

The Court of Appeals affirmed. (R. 80–85; Pet. 16–24.)

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[4] The taxpayer's return having been filed on April 14, 1944 (R. 45), the proposed income tax deficiency would have been barred—under the general three year period of limitation prescribed in Section 275 of the 1939 Code—but for the application of Section 3807 (R. 45, 53; see also R. 6, 13).

[5] A subsequent motion (R. 64–71) by the taxpayer for a review by the full Tax Court was denied (R. 71).

ARGUMENT

The courts below correctly upheld the challenged income tax deficiency as timely under Section 3807 of the 1939 Code (Appendix, *infra*, pp. 24–26), since the deficiency was clearly determined within the one year special period of limitation prescribed in that section with respect to related taxes, such as the corporate income tax and the World War II excess profits tax, under Chapters 1 and 2 of the 1939 Code. Moreover, there is no conflict of decisions and no question of general importance warranting review by this Court.

1. During the Second World War, under the system in effect beginning with 1942, the corporate income tax and the excess profits tax were inter-related, so that the income tax was imposed only upon that portion of corporate income which was not subjected to the excess profits tax, with the result that any subsequent adjustment with respect to the excess profits tax would require a corresponding adjustment with respect to the income tax. After the 1942 change[*]—by the so-called "cross-credit" provision of Section 26(c) (Appendix, *infra*, pp. 15–16), and by complementing provisions in Section 13(a)(2) (Appendix, *infra*, p.

[*] Before the 1942 change, the amount of the excess profits tax itself constituted a deduction for the purpose of computing the normal income tax and surtax upon corporations, under Chapter 1 of the 1939 Code. See Section 23(c) of that Code, as amended by Section 202(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687.

Prior to that, i.e., for the year 1940, the Chapter 1 income taxes were deductible from the income to be subjected to the excess profits tax. See Section 711(a)(1)(A) and 2(C) of the 1939 Code, as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974.

13), and Section 15(a) (Appendix, *infra*, pp. 14–15), as amended by Section 105 (a), (b) and (d) of the Revenue Act of 1942, c. 619, 56 Stat. 798—a corporation, for the purpose of computing its normal income tax and its surtax under Chapter 1 of the Code, was allowed a credit for the amount of income subjected to the excess profits tax, or, specifically, a credit in "an amount equal to its adjusted excess-profits net income (as defined in section 710(b))." The change resulted in a complete inter-relationship, and a complete and automatic interdependence, between the income and excess profits taxes. See *Mutual Shoe Co.* v. *Commissioner*, 238 F. 2d 729, 733 (C.A. 1st), certiorari denied, 353 U.S. 935; see also *United States* v. *Koppers Co.*, 348 U.S. 254, 259, 266–267, fns. 7 and 16.

To give complete effectiveness to the inter-relationship of the two taxes, Congress subsequently added Section 3807 to the Code, by Section 513(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21—to provide that, where an adjustment is made with respect to one of the taxes under Chapters 1 or 2, and that adjustment results in an overpayment (or deficiency) in that tax, which is not barred, and where that adjustment, when appropriately reflected in the computation of the other related tax, would result in a deficiency (or overpayment) in the other tax, which is then barred, the resultant deficiency (or overpayment) in such other tax may nevertheless be determined within one year after the adjustment was made with respect to the first tax. See Statement of Managers on the part of the House, H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 72–

76 (1944 Cum. Bull. 1059, 1082–1085); 90 Cong. Rec., Part 1, p. 275; see also Regulations prescribed under Section 3807, by T.D. 5409, 1944 Cum. Bull. 466–472 (26 C.F.R. §§ 473.1–473.7).'

2. The instant case presents a situation which Section 3807 was clearly designed to meet, so as to permit the assessment of a deficiency in income tax at any time within one year after the allowance of a refund or credit in the related excess profits tax for the same year.

The excess profits tax overpayment determined in the prior case automatically gave rise, by operation of law, to an income tax deficiency which would have been barred (under the general three year period of limitations prescribed in Section 275) but for the application of Section 3807. See *Morrisdale Coal Mining Co.* v. *Commissioner*, 21 T.C. 393; *Pine Hill Crystal Spring Water Co.* v. *United States*, 121 F. Supp. 480 (S.D. N.Y.); *Morrisdale Coal Mining Co.* v. *United States*, 142 F. Supp. 930 (C. Cls.). See also *Merrimac Hat Corp.* v. *Commissioner*, 32 T.C. 1082; *Philadelphia*

'In the Korean War Excess Profits Tax Law, Congress deliberately discarded the so-called "two-basket" approach of the World War II law, and substituted a system whereby the excess profits tax would constitute an "additional tax", over and above the regular income tax, under Chapter 1 of the Code—so that the two taxes (income and excess profits) would be treated as one for general administrative purposes (*i.e.*, for purposes of the statute of limitations, the allowance of refunds or credits, the sending of 90-day letters, etc.), and so that any subsequent adjustment as to the excess profits tax would not also require an adjustment as to the income tax. See H. Rep. No. 3142, 81st Cong., 2d Sess., p. 4 (1951-1 Cum. Bull. 187, 189); S. Rep. No. 2679, 81st Cong., 2d Sess., pp. 4–5 (1951-1 Cum. Bull. 240, 242–243).

Macaroni Co. v. *United States*, 180 F. Supp. 539 (E.D. Pa.). As both courts below pointed out (R. 52–54, 84–85; Pet. 22–23); all of the elements necessary to make Section 3807 operative are present.

3. There is no basis for the taxpayer's assertion (Pet. 8) that it is not shown that the reduction in excess profits tax determined in the prior case automatically resulted in a correlative increase in income tax. As explicitly indicated (R. 11) in the Statement accompanying the Commissioner's deficiency notice, the Tax Court's decision in the prior case had effected increases in "Excess profits credit" and "Unused excess profits credit" in the aggregate amount of $83,226.54. Thus, the taxpayer's "adjusted excess profits net income" under Section 710(b) (Appendix, *infra*, p. 21) was reduced for excess profits tax purposes by that aggregate amount, and that amount, thereby released from the reach of the excess profits tax, automatically became—by reason of the reduced "cross-credit" under Section 26(e)—subject to the income tax (normal and surtax), through correspondingly reduced credits under Section 13(a)(2) and 15(a).[*]

4. There is no merit to the taxpayer's contention (Pet. 4, 5, 9, 10) that the courts below erred in assuming that a refund (or credit) of an excess profits tax overpayment was "allowed" in the prior

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[*] The income tax deficiency challenged in this proceeding is exactly 40%—the combined rate then applicable (see R. 10) for the normal tax (24%) under Section 13(b)(1) (Appendix, *infra*, p. 14) and the surtax (16%) under Section 15(b)(3) (Appendix, *infra*, p. 15)—of that $83,226.54.

proceeding—so as to bring Section 3807 into play (cf. Pet. 3–4). Contrary to the assertion (Pet. 5) that the decision in the prior case "merely finds an overpayment", the Tax Court in the prior case actually decided (R. 43) that there was an excess profits tax overpayment of $26,475.54 which was paid within three years prior to the filing of the claim (for refund), which had been filed within three years from the filing of the return—which, in and of itself, by operation of law, under the provisions of Section 322(d) of the 1939 Code (Appendix, *infra*, pp. 18–19) [9] or of the successor provisions of Section 6512(b) of the 1954 Internal Revenue Code, made that overpayment refundable (or creditable). Thus, the prior decision was, at least for the purposes of Section 3807, the legal equivalent of an order allowing the refund or credit of the excess profits tax overpayment, which Section 322(d) itself directed "shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer"—in keeping with the requirement of Section 322(a)(1) (Appendix, *infra*, p. 16) that the overpayment shall be first

[9] These provisions, conferring authority upon the Tax Court to in effect direct the refund (or credit) of any overpayment it might determine, had been first introduced into the law in Section 322(d) and Section 504 of the Revenue Act of 1934, c. 277, 48 Stat. 680—to confer jurisdiction upon the Board of Tax Appeals (as the Tax Court was then known) "to determine not only that the taxpayer has made an overpayment of tax, but also whether such overpayment is refundable." H. Rep. No. 704, 73d Cong., 2d Sess., pp. 35, 37–38 (1939–1 Cum. Bull. (Part 2) 554, 581, 582). See also S. Rep. No. 558, 73d Cong., 2d Sess., pp. 44, 47 (1939–1 Cum. Bull. (Part 2) 586, 620, 622).

credited against any taxes due from the taxpayer, and the balance refunded.

5. Contrary to the taxpayer's suggestion (Pet. 7), the conclusion of the courts below is fully consistent with the available legislative history. That history indicates rather clearly, by the changes in the phraseology of Section 3807 which were made at the conference on the bill which became the Revenue Act of 1943, that it was not intended that Section 3807 should come into play only after the making of a refund or credit of an overpayment, but that it should become operative merely upon the allowance of a credit or refund of an overpayment [10]—which, under our statutory scheme, can come about either by the administrative action of

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[10] Section 3807 was first offered as a "floor" amendment in the Senate (90 Cong. Rec., Part 1, p. 275), after the Bill (which became the Revenue Act of 1943) had been reported upon by the Finance Committee, and the proposal was adopted in the form in which offered, and in that form found its way into the bill as passed by the Senate (*id.*, pp. 275, 543). The only changes made in Section 3807 came about in the conference (cf. *id.*, pp. 634, 1299–1301, 1358–1359), and perhaps one of the most significant changes was in the phraseology used to specify the conditions upon which Section 3807 should become operative in the case where an overpayment is determined first in one of two related taxes. As originally proposed and as passed by the Senate, Section 3807 would have become operative if a "credit or refund [is] allowed or made" (see 90 Cong. Rec., Part 1, p. 275). As changed in the Conference, and as finally adopted, it becomes operative if a "credit or refund of an overpayment is allowed" (Section 3807(b)(1)). A similarly significant refinement was reflected in the change, from the language originally proposed to that finally adopted, setting forth that the resultant deficiency in the other (related) tax could be asserted within one year.

the Commissioner [11] or by a decision of the Tax Court.

6. Clearly, there is no conflict, as asserted (Pet. 4, 5–6, 10), with *United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, *Commissioner* v. *Gooch Co.*, 320 U.S. 418, or *Empire Ordnance Corp.* v. *Harrington*, 249 F. 2d 680 (C.A. D.C.). The *Girard* and *Empire* cases involved the wholly unrelated question whether mandamus was the appropriate remedy to compel the Commissioner to refund taxes determined by the Tax Court to have been overpaid. *Gooch* involved an equally unrelated question as to whether the Tax Court had jurisdiction to apply the doctrine of equitable recoupment, so as to offset a barred overpayment for a prior year against a timely deficiency for the taxable year properly before it.

7. Nor is the decision below in any way inconsistent, as claimed (Pet. 4, 7), with the provisions of the Regulations prescribed under Section 3807, 26 C.F.R. §§ 473.1–473.7, *supra*. The particular example, given in Section 473.4 of the Regulations, referred to by the taxpayer (Pet. 7), is of a situation in which the adjustment first made in one of the related taxes covered by Section 3807 results in a deficiency, in which case the statute itself clearly requires that the deficiency be assessed in order for Section 3807 to come into play—whereas, in the situation here, the first adjustment results in an overpayment, in which case Section 3807 becomes operative merely upon the allowance of the credit or refund.

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[11] Compare Sections 6402(a) and 6407 of the 1954 Code (and their respective predecessors, Sections 322(a) and 3770(a)(3) of the 1939 Code) with Pet. 9.

8. Contrary to the taxpayer's suggestion (Pet. 4, 11), the question presented in this case is not important, since Section 3807 has long since been repealed (see fn. 7, *supra;* R. 59–60, 85), and since it was applicable only with respect to World War II excess profits taxes, as to which the remaining controversies have been rapidly diminishing.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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DECEMBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SUBTITLE A—TAXES SUBJECT TO THE JURISDICTION OF THE TAX COURT OF THE UNITED STATES[1]

CHAPTER 1—INCOME TAX

* * * * *

SUBCHAPTER B—GENERAL PROVISIONS

PART I—RATES OF TAX

* * * * *

SEC. 13. TAX ON CORPORATIONS IN GENERAL.

(a) [as amended by Sec. 201 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 105 (a)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—For the purposes of this chapter—

(1) *Adjusted net income.*—The term "adjusted net income" means the net income minus the credit provided in section 26(a), relating to interest on certain obligations of the United States and Government corporations.

(2) *Normal-tax net income.*—The term "normal-tax net income" means the adjusted net income minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26(c) and minus the credit for dividends received provided in section 26(b).

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[1] The name of the Board of Tax Appeals was changed to the Tax Court of the United States by Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

(b) [as amended by Sec. 101(a) of the Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation the normal-tax net income of which is more than $25,000 (except a corporation subject to the tax imposed by section 14, section 231(a), Supplement G, or Supplement Q) whichever of the following taxes is the lesser:

(1) [as amended by Sec. 103(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General rule.*—A tax of 24 per centum of the normal-tax net income; or

(2) [as further amended by Sec. 105(a)(2) of the Revenue Act of 1942, *supra*] *Alternative tax (corporations with normal-tax net income over $25,000, but not over $50,000).*—A tax of $4,250, plus 31 per centum of the amount of the normal-tax net income in excess of $25,000.

* * * * *

(26 U.S.C. 1952 ed., Sec. 13.)

SEC. 15 [as added by Sec. 201 of the Revenue Act of 1942, c. 419, 54 Stat. 516, and amended by Sec. 105(b) of the Revenue Act of 1942, *supra*] SURTAX ON CORPORATIONS.

(a) *Corporation Surtax Net Income.*—For the purposes of this chapter, the term "corporation surtax net income" means the net income minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26(c) and minus the credit for dividends received provided in section 26(b) (computed by limiting such credit to 85 per centum of the net income reduced by the credit for income subject to the tax imposed by Subchapter E of Chapter 2 in lieu of 85 per centum of the adjusted net income so reduced), and minus, in the case of a public

utility, the credit for dividends paid on its preferred stock provided in section 26(h). * * *

"(b) *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation (except a Western Hemisphere Trade Corporation as defined in section 109, and except a corporation subject to the tax imposed by section 231(a), Supplement G, or Supplement Q), a surtax as follows:

(1) *Surtax net incomes not over $25,000.*—Upon corporation surtax net incomes not over $25,000, 16 per centum of the amount thereof.

(2) *Surtax net incomes over $25,000 but not over $50,000.*—Upon corporation surtax net incomes over $25,000, but not over $50,000, $2,500, plus 22 per centum of the amount of the corporation surtax net income over $25,000.

(3) *Surtax net incomes over $50,000.*—Upon corporation surtax net incomes over $50,000, 16 per centum of the corporation surtax net income.

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 15.)

SEC. 26. CREDITS OF CORPORATIONS.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

* * * * * *

(c) [as amended by Sec. 105(d) of the Revenue Act of 1942, *supra*, and Sec. 202(c) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Income Subject to Excess-Profits Tax.*—In the case of any corporation subject to the tax imposed by Subchapter E of Chapter 2, an amount equal to

its adjusted excess-profits net income (as defined in section 710(b)). In the case of any corporation computing such tax under section 721 (relating to abnormalities in income in the taxable period), section 726 (relating to corporations completing contracts under the Merchant Marine Act of 1936), section 731 (relating to corporations engaged in mining strategic minerals), or section 736(b) (relating to corporations with income from long-term contracts), the credit shall be the amount of which the tax imposed by such subchapter is 95 per centum. For the purpose of the preceding sentence the term "tax imposed by Subchapter E of Chapter 2" means the tax computed without regard to the limitation provided in section 710(a)(1)(B) (the 80 per centum limitation), without regard to the credit provided in section 729 (c) and (d) for foreign taxes paid, and without regard to the adjustments provided in section 734. This subsection shall not apply to any corporation exempt from such tax under section 725 or section 727.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 26.)

SEC. 322. REFUNDS AND CREDITS.

(a) [as amended by Sec. 172(e)(1) of the Revenue Act of 1942, *supra*] *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return

was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) [as amended by Sec. 169(a) of the Revenue Act of 1942, *supra*] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

* * * * *

(3) [as added by Sec. 169(a) of the Revenue Act of 1942, *supra*] *Exceptions in the case of waivers.*— * * *

* * * * *

(c) *Effect of Petition to Tax Court.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with The Tax Court of the United States within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

* * * * *

(d) [as amended by Sec. 169(b) of the Revenue Act of 1942, *supra*, and Sec. 5(c) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] [3] *Overpayment Found by Tax Court.*— If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Tax Court determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer pursuant to section 276(b) to extend beyond the time prescribed in section 275 the time within which the Commissioner might assess the tax, whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer, or (C) after the execution of such an agreement and before the expiration of the period within which the Commissioner might make an assess-

[3] By Section 5(f) of the Tax Adjustment Act of 1945, *supra*, the amendment made by that Act to Section 322(d) was made applicable to all taxable years beginning after 1940. The amendment to Section 322(d) made by the Revenue Act of 1942, *supra*, was effective for all taxable years beginning after January 1, 1942, and, under certain conditions, even for prior years. See Section 169(c) of the 1942 Act, as amended by Section 509 of the Revenue Act of 1943, *supra*.

ment pursuant to such agreement or any extension thereof, or (D) after the mailing of the notice of deficiency; or (2), if such portion was not paid within the period described in clause (1), but the notice of deficiency was mailed within seven years from the time prescribed for the filing of the return, or a claim described in subsection (b)(5) was filed, that such portion does not exceed the amount of the overpayment attributable to the deductibility of items described in subsection (b)(5); or (3), if such portion was not paid within the period described in clause (1), but the notice of deficiency was mailed within the period prescribed in subsection (b)(6) for the filing of a claim for credit or refund of an overpayment attributable to a carry-back, or such a claim was filed, that such portion does not exceed the amount of the overpayment attributable to a carry-back.

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(26 U.S.C. 1952 ed., Sec. 322.)

CHAPTER 2—ADDITIONAL INCOME TAXES

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SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Sec. 201 of the Second Revenue Act of 1940, *supra*, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940"].

PART I

SEC. 710. IMPOSITION OF TAX.

(a) [as amended by Sec. 201(a) of the Revenue Act of 1941, *supra*, and Sec. 202 of the Revenue Act of 1942, *supra*] *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income,

as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) [as amended by Sec. 202(a) of the Revenue Act of 1943, *supra*] 95 per centum of the adjusted excess profits net income,[3] or

(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter).

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[3] This 95 per cent rate was made applicable only for taxable years beginning after December 31, 1943 (see Section 201 of the 1943 Act). The rate for prior years was 90 per cent (see Section 202 of the 1942 Act).

With respect to fiscal years beginning in 1943 and ending in 1944 (as the taxable year involved in this case), Section 710(a)(6) provided that the tax be prorated at the 90 per cent and 95 per cent rates, respectively, over 1943 and 1944—and the Commissioner's computation of the excess profits tax in this case for the fiscal year ended January 31, 1944 (R. 11-12), reflects this prorating. A similar prorating over 1943 and 1944 was followed in the Commissioner's computation of the income tax for that taxable year (R. 10-11), in keeping with a corresponding prorating requirement prescribed with respect to the income tax by Section 108(b) of the 1943 Act. Both computations also reflect the increase from $5,000 to $10,000 in the amount of the excess profits tax "specific exemption" under Section 710(b)(1) effective after December 31, 1943, under Section 204(a) of the 1943 Act.

(6) [as added by Sec. 203(a) of the Revenue Act of 1943, *supra*] *Taxable years beginning in 1943 and ending in 1944.*—In the case of a taxable year beginning in 1943 and ending in 1944, the tax shall be an amount equal to the sum of—

(A) that portion of a tentative tax, computed as if the law applicable to taxable years beginning on January 1, 1943, were applicable to such taxable year, which the number of days in such taxable year prior to January 1, 1944, bears to the total number of days in such taxable year, plus

(B) that portion of a tentative tax, computed as if the law applicable to taxable years beginning on January 1, 1944, were applicable to such taxable year, which the number of days in such taxable year after December 31, 1943, bears to the total number of days in such taxable year.

(b) [as amended by Sec. 2(a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by Sec. 204(a) of the Revenue Act of 1942, *supra*] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) [as amended by Sec. 204(a) of the Revenue Act of 1943, *supra*] *Specific exemption.*—A specific exemption of $10,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) [as amended by Sec. 204(a) of the Revenue Act of 1942, *supra*] *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

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(26 U.S.C. 1952 ed., Sec. 710.)

SEC. 711. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13(a)(2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

(A) [as amended by Sec. 206(a) of the Revenue Act of 1942, *supra*] *Income Subject to Excess Profits Tax.*—In computing such normal-tax net income the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter) shall not be allowed;

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(C) [as amended by Sec. 206(a)(2) of the Revenue Act of 1942, *supra*] *Income Subject to Excess Profits Tax.*—In computing such normal-tax net income the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter) shall not be allowed;

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(26 U.S.C. 1952 ed., Sec. 711.)

SUBTITLE D—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 38—MISCELLANEOUS PROVISIONS

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SEC. 3801. MITIGATION OF EFFECT OF LIMITATION AND OTHER PROVISIONS IN INCOME TAX CASES.

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(d) [as amended by Sec. 14(b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231 *] *Ascertainment of Amount of Adjustment.*—In computing the amount of an adjustment under this section there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of the tax previously determined shall be the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return (determined as provided in section 271(b)(1) and (3)), if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in section 271(b)(2), made.

There shall then be ascertained the increase or decrease in the tax previously determined which results solely from the correct exclusion, inclu-

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*Section 14(e) of the Individual Income Tax Act of 1944, insofar as material to this amendment, stated:

(e) *Taxable Years to Which Applicable.*—* * * The amendment made by subsection (b) to section 3801(d) of the Internal Revenue Code shall, for the purposes of such section and sections 124, 130, and 3807 of such Code, be applicable in the determination of a tax previously determined only if such tax is for a taxable year beginning after December 31, 1942. * * *

sion, allowance, disallowance, recognition, or non-recognition, of the item, inclusion, deduction, credit, gain, or loss, which was the subject of the error. The amount so ascertained (together with any amounts wrongfully collected, as additions to the tax or interest, as a result of such error) shall be the amount of the adjustment under this section.

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(26 U.S.C. 1952 ed., Sec. 3801.)

SEC. 3807 [as added by Sec. 513(a) of the Revenue Act of 1943, *supra*[5]] PERIOD OF LIMITATIONS IN CASE OF RELATED TAXES UNDER CHAPTER 1 AND CHAPTER 2.

(a) *Definitions.*—As used in this section—

(1) The term "tax previously determined" shall have the meaning assigned to such term by section 3801(d).

(2) The term "the same taxable year" shall include any taxable year which coincides in whole or in part with the taxable year for which the determination referred to in subsection (b) is made.

(b) *Extension of Period of Limitations.*—If—

(1) under a determination in respect of a tax imposed by Chapter 1 or Chapter 2, a deficiency is assessed or a credit or refund of an overpayment is allowed, within the period of limitations properly applicable thereto, and

(2) the application of the law or facts determined in the ascertainment of such deficiency or overpayment to any other such tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the

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[5] By Section 513(b) of the 1943 Act, Section 3807 was made applicable to all taxable years beginning after December 31, 1939.

amount of the tax previously determined in respect of such other tax, and

(3) on any date prior to the expiration of one year from the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (1), the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (2) is prevented (except for the provisions of section 3801 or 734) by the operation (whether before, on, or after the date of enactment of the Revenue Act of 1943) of any law or rule of law other than this section and other than section 3761 (relating to compromises),

then upon such date the increase or decease in the tax referred to in paragraph (2) shall be considered a deficiency or an overpayment, as the case may be. Such deficiency may be assessed and collected or such overpayment may be credited or refunded as if on the date the deficiency is assessed or the credit or refund allowed in respect of the tax referred to in paragraph (1) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund in respect of the tax referred to in paragraph (2) for the same taxable year.

(c) *Adjustment Unaffected by Other Items, Etc.*—In determining whether an increase or decrease in the amount of the tax previously determined shall be considered to result from the application of the law or facts under a determination referred to in subsection (b)(1) changes shall be made in items which are the subject of such determination and in items which are affected thereby, and in no others. The amount which may be assessed or allowed as a credit or refund under subsection (b) shall not be diminished by any credit or set-off based upon any item which was not the sub-

ject of such determination or affected thereby. Such amount, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item which was not the subject of such determination or affected thereby, except in connection with a subsequent application of this section.

(d) *Application to Affiliated Groups.*—As used in subsection (b) the term "any other such tax of the taxpayer" shall, if the taxpayer was a member of an affiliated group, also include any other such tax of any other member of the group.

(26 U.S.C. 1952 ed., Sec. 3807.)